

Report

Report subject: Appropriation of lands at Bourne Hill

Report to: Cabinet

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Cabinet Member for Resources Councillor Andrew Roberts

1. Summary

To decide whether to appropriate lands at Bourne Hill.

2. Background

2.1. Officers recommended to Cabinet at its meeting on 31.05.07 that if Cabinet decides to continue with the Office Centralisation Project ["the Project"] as planned Cabinet should resolve to pursue with the appropriation of the Secret Garden and the strip of land ["the Strip"] between the Secret Garden and the access road to College Street permanently for construction works and an area lying immediately to the east of the Secret Garden ["the Adjoining Land"] temporarily for tree protection measures and temporary construction works.

2.2. Cabinet deferred making a decision on initiating the process of appropriation pending the outcome of external advice sought on the Project.

2.3. In the light of the timetable for the making of a decision on the Project being reduced Cabinet considered whether to initiate the process of appropriation again at its meeting on 13.06.07. Cabinet agreed to initiate the process of appropriation with a view to making a decision on 23.07.07 whether to appropriate or not.

3. The appropriation process

3.1. An advertisement of the Council's intention to consider appropriation was placed in



Awarded in:
Housing Services
Waste and Recycling Services



the Salisbury Journal for two consecutive weeks on 21.06.07 and on 28.06.07. A page was also placed on the Council's website on 21.06.07. The closing date for written representations to be made is 18.07.07. In view of the postal strike representations received on 19.07.07 have been included in the responses.

3.2. A total of 99 valid responses have been received from 33 people. Responses received in the names of more than one person have been treated as separate responses in their own right. One person responded in his or her own right and on behalf of a group. Both responses have been included. The total has been broken down as follows:

3.2.1. Secret Garden

- Support: 1
- Object: 32

3.2.2. The Strip

- Support: 1
- Object: 32

3.2.3. The Adjoining Land

- Support: 1
- Object: 32

3.3. One response states "this is a test" and has been ignored. Another response was duplicated and the duplicate has been ignored.

3.4. The supporter states ' £6.4M is a lot of money to lose".

3.5. A summary of the issues raised by the Objections and Officer comments can be found in the Appendix to this Report. The Objections mainly focus on the stated rights of the public over the lands the impact of the application to register the lands as a village green and the Human Rights Act. It is the view of Officers for the reasons set out in the Officers comments that there are no impediments preventing Cabinet from resolving to appropriate any some or all of the Lands should Cabinet be minded to do so.

4. Options

Cabinet can:

- Decline to appropriate any or any combination of or all of the Lands
- Appropriate any or any combination of or all of the Lands

5. Recommendations

- Secret Garden: appropriate in the event that the Project continues as planned or in a modified form which involves construction related activities on any part of the Secret Garden
- The Strip: appropriate in the event that the Project continues as planned
- The Adjoining Land: appropriate in the event that the Project continues as planned or in a modified form which involves construction related activities on any part of the Secret Garden and in either such case a report to be brought back to Members following completion of the Project or a modified Project for Members to review appropriation

6. Background papers

Written responses

7. Implications

- Key decision: no
- Financial: none unless the absence of appropriation triggers the issue of a notice under section 114 of the Local Government Finance Act 1988 or breach of the construction contract as set out in the legal implications below
- Legal:

The Council may appropriate land from one statutory purpose to another under section 122 Local Government Act 1972 as amended provided the Council has first advertised notice of its intention to do so in a local newspaper for two consecutive weeks and considers any objections. External legal advice is that appropriation for planning purposes for development in accordance with a planning permission would defeat any subsequent attempt to register the appropriated land as a town or village green.

In the event that a decision is made to continue the Project as planned

- non appropriation of the Strip and of the Adjoining Land will mean that the Council is potentially unable to secure the extent of the lands necessary to deliver possession to the main contractors. Failure to give possession will be a breach of the construction contract and entitle the main contractor to damages for any loss caused.
- non appropriation of all of the lands risks exposing them to a successful application to register them as a town or village green the effect of which would mean that the Council could be required to remove any structures built upon them.
- Human rights: article 6 [right to a fair trial] is likely to be engaged. The availability of judicial review is likely to satisfy this article. Article 14 [prohibition of discrimination] will be engaged in the event that any other article is engaged. It is not thought that any other article is likely to be engaged. Any interference arising out of any appropriation is judged to be in pursuit of a legitimate aim [the Project] and proportionate [having regard to the extent of any appropriation]
- Personnel: none
- ICT: none
- Community safety: any appropriation will facilitate the securing of the site needed for any construction works and thereby minimise health and safety risks
- Environmental:
- Council's core values: communicate
- Wards affected: St Edmund and Milford

Table Summary of Consultation Objections on proposed appropriation of lands at Bourne Hill

Summary of Objections. [where an Objector has identified more than one ground of objection each ground has been counted]:

ISSUE RAISED	NO. OF RESPONSES	OFFICER COMMENT
The lands are the subject of an application to register them as a village green	21	An application which has not been determined does not preclude the Council from considering appropriation
The lands are held in trust for public use	2	So far as the Secret Garden is concerned it is the view of Officers that this is within the curtilage of the Council House. So far as the Strip and the Adjoining Land is concerned it was held in Hall v Beckenham Corporation that a Council owned park acquired under the Public Health Act 1875 was held in trust for public use but section 122 of the Local Government Act 1972 enables the Council to appropriate land held for one statutory purpose to some other statutory purpose
The current uses of the lands should continue	2	It has been held in the case of Dowty Boulton Paul Ltd v Wolverhampton Corporation that the local authority is the sole judge of the question whether or not any land is still required for the purposes for which it is held
The lands have been used for 20 years as of right	6	So far as the Secret Garden is concerned it is the view of Officers is that the public have had limited permissive user since 1996. External legal advice is that with regard to the Strip and the Adjoining

		<p>Land use is "by right" not "as of right" on account of the fact that they were appropriated as places of public recreation by a resolution of the Council's predecessor in title on 17.12.1926.</p> <p>Part IX of the Town and Country Planning Act 1990 sets out the circumstances in which third party rights can be extinguished in respect of land appropriated for planning and related purposes</p>
Appropriation cannot remove pre existing rights	2	<p>Subject to the provisions of the Town and Country Planning Act 1990 and any other statutory provisions it is agreed that appropriation cannot remove pre-existing private rights. In A-G v Manchester Corporation the court took the view that "public rights must always be affected by the alteration of the purposes for which the land has been acquired."</p>
The Council has failed to show that the lands are not required for their original purposes	4	<p>It has been held in the Dowty case that the local authority is the sole judge</p>
The Council has dedicated the lands for recreational use by the public	8	<p>So far as the Secret Garden is concerned it is the view of Officers is that the public have had limited permissive user since 1996.</p> <p>Whilst the Strip and the Adjoining Land were historically appropriated as places of public recreation section 122 of the Local Government Act 1972 enables the Council to appropriate them to</p>

		another purpose
<p>Appropriation of the lands would be in breach of Article 6 of the Human Rights Act</p> <ul style="list-style-type: none"> - the Council is not independent being a party to any appropriation - the Council is not impartial having already contracted to build on the lands - it is not a public hearing - it is not a tribunal established by law - as matters of fact are in dispute judicial review would not be adequate 	3	<p>Cabinet is now made up of Members who were not members of the Council's administration at the time when the decision was made and action taken to contract to build.</p> <p>The agenda item is in open business.</p> <p>Section 122 of the Local Government Act gives the Council the statutory authority to consider appropriation.</p> <p>The House of Lords held in <i>Begum v Tower Hamlets London Borough Council</i> that the composite procedure of an administrative policy decision involving the exercise of a discretion together with a right of judicial review is generally sufficient. In any event appropriation does not involve the determination of issues concerning individual rights</p>
<p>St Edmunds Association has a right of access to the Secret Garden for the creation of the compost demonstration</p>	4	<p>It is the view of Officers that the public have had limited permissive user since 1996.</p> <p>In any event part IX of the Town and Country Planning Act 1990 sets out the circumstances in which third party rights can be extinguished in respect of land appropriated for planning and related purposes</p>
<p>The Council will be acting outside its powers if the village green application is successful</p>	2	<p>An application which has not been determined does not preclude the Council from considering appropriation</p>
<p>Questions whether a temporary appropriation is</p>	1	<p>The Council is not in principle precluded from</p>

possible		considering successive appropriations of the same land
Object but no or no clear reasons	5	No comments possible